No. 82-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and VISTA IRRIGATION DISTRICT,
Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF MISSION INDIANS, and THE SECRETARY OF INTERIOR in his capacity as trustee for said Bands,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION DISTRICTS OF THE FLATHEAD IRRIGATION PROJECT, MONTANA, IN SUPPORT OF PETITIONERS

IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST OF THE JOINT BOARD OF CONTROL

The Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts was organized in 1980 by its three constituent Montana irrigation districts ("the Districts"), pursuant to Sections 85-7-1601 *et seq.* of the Montana Code Annotated, to act as operating

agent for the Districts. The Districts include the Indian and non-Indian lands (other than Indian trust lands) irrigated by the Flathead Irrigation Project ("Irrigation Project") of the Flathead Indian Reservation, Montana ("Reservation").[1]

The Districts were incorporated under Montana law in 1926, in response to the Act of May 10, 1926, 44 Stat. 453, 465, whereby Congress expressly conditioned continued construction of an Irrigation Project power generating facility at the site of the present Kerr Hydroelectric Development of the Montana Power Company (as well as availability of additional federal funds for any Irrigation Project construction) upon formation of Montana irrigation districts embracing lands irrigable by the Irrigation Project, and execution by such districts of contracts with the United States assuring repayment of reimbursable construction and other Irrigation Project costs to the United States, upon security of a first lien on district lands. The 1926 legislation provided that revenues from the sale of power long in process of development by the Irrigation Project at the Kerr site would be used first to repay costs of the power development, and then to repay other reimbursable Irrigation Project construction and other costs.

Before execution by the Districts of repayment contracts as contemplated by the 1926 legislation, Congress, by the Act of March 7, 1928, 45 Stat. 200, 212-13, authorized the Federal Power Commission, "in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior," to license the reserved or appropriated water power rights of the Irrigation Project at the Kerr site to a private company or

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[1] For a survey of the history of the Reservation, the Irrigation Project, and the Districts, *see Confederated Salish & Kootenai Tribes v. United States*, 199 Ct. Cl. 599, 467 F.2d 1315 (1972).

companies for more extensive development.[2] The 1928 legislation also provided that the annual rental required by Section 10(e) of the Federal Water Power Act for necessary easements and rights-of-way affecting lands of the Confederated Salish and Kootenai Tribes ("the Reservation Tribes") should be paid to the Reservation Tribes and bear interest at a stipulated rate.

In 1930 the Federal Power Commission in fact issued a license (License No. 5) to the Rocky Mountain Power Company, Montana Power Company's predecessor, to develop a large generation facility at the Kerr site. Consistent with the 1928 enabling legislation and at the behest of the Secretary of the Interior, the Commission, by Article 26 of License No. 5, granted certain blocks of low cost electric energy to the Irrigation Project for use for pumping and resale to power customers within the Reservation, as compensation for use by the licensee of the Irrigation Project's prior rights to the Kerr site. *See Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983). The Commis-

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[2] This special legislation was required because Congress recognized that the Federal Water Power Act of 1920 did not authorize displacement, in favor of a Federal Power Commission licensee, of the Irrigation Project development already in progress. *See, e.g.*, 69 Cong. Rec. 2478 (February 4, 1928). The requirement for separate Secretarial approval was included in the special legislation to assure that the Irrigation Project, as well as the Reservation Tribes, would receive proper compensation from the licensee. *See, e.g.*, the testimony of Louis C. Crampton, Chairman of the House Appropriations Subcommittee which reported the special legislation essentially as enacted, before the Federal Power Commission in 1929, *reprinted in* Part 10 ("Flathead Reservation, Mont.") of the Survey of Conditions of the Indians of the United States, Hearings before a Subcommittee on Indian Affairs of the U.S. Senate, 71st Cong., 2d Sess., April 10, July 24, 25, 1930 at 4298-4306. At the time of enactment of the special legislation, Congress recognized that the Reservation Indians, whose tribal lands were involved, did not own the water power rights previously set aside by the Government for the Irrigation Project. *See, e.g.*, 69 Cong. Rec. 2479, 2487.

sion also fixed an annual rental to be paid to the Reservation Tribes for the use of tribal lands.

Pursuant to the Act of May 25, 1948, 62 Stat. 269, revenues from Irrigation Project resale of the low cost energy furnished to the Irrigation Project pursuant to Article 26 of License No. 5 must be employed for reimbursement, first, of Project power distribution system construction costs; then for reimbursement of other Project construction costs including irrigation construction costs; and finally for other Irrigation Project purposes.

The Indian and non-Indian owners of lands irrigated by the Irrigation Project are, as such, beneficial owners of the Irrigation Project and of its associated water and water power rights, including the right to continue to receive low cost power from the licensee of the Kerr Development for irrigation pumping and for resale to power customers on the Reservation. *See Nevada v. United States*, 51 U.S.L.W. 4974, 4977-79 (U.S. June 24, 1983). In addition, pursuant to the Act of May 29, 1908, 35 Stat. 444, 448-50, these landowners will by law ultimately succeed to the management and operation of the Irrigation Project. Accordingly, the Joint Board, as the representative of these landowners, speaks for the beneficial owners and future managers and operators of the Irrigation Project and its associated water and water power rights, including the right to continue to receive low cost energy from the present and any future licensee or operator of the Kerr Hydroelectric Development. As such, the Joint Board has a great interest in protecting the Irrigation Project's rights, and in assuring the development of available resources needed to meet increasing demand for water and power on the Reservation.

Accordingly, the Joint Board has sought and been granted intervention by the Federal Energy Regulatory Commission ("FERC") in proceedings now in process, pursuant to Section 15(a) of the Federal Power Act, 16

U.S.C. § 808(a), looking toward the relicensing of the Kerr Hydroelectric Development. *See Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983), *supra*.[3] In addition, in order to assure development of available and needed supplemental power, the Joint Board has applied to FERC for preliminary permits for low-head hydropower developments at various sites on the Reservation.[4] In all those proceedings the Reservation Tribes, who are organized pursuant to the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*, have invoked statutory provisions at issue in the instant case—Sections 4(e) and 10(e) of the Federal Power Act, and Section 16 of the Indian Reorganization Act—to assert that FERC is absolutely powerless to relicense the Kerr Development, or to issue the preliminary permits, without the Tribes' consent.

In the instant case, a majority of a Ninth Circuit three-judge panel has held that FERC's express authority to license and relicense Indian reservation lands for hydropower projects, contained in Section 4(e) and 15(a) of the Federal Power Act, does not override Section 8 of the Mission Indian Relief Act, Act of January 12, 1891, 26 Stat. 712 ("MIRA"), which the majority interpreted

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[3] The original 50-year license for the Kerr Development (License No. 5) expired on May 22, 1980. The Montana Power Company, the present licensee, and the Reservation Tribes have filed competing applications for a new license for the Development. The Montana Power Company does not object in principle to the continuation of low cost energy for the Irrigation Project, but the Tribes vigorously oppose it. It is anticipated that the competing applications will proceed to hearing in 1984. In the interim, the expired license is renewed annually.

[4] Lower Crow Creek Project (Project No. 5208-001); Mission Dam Power Project (Project No. 5653-000); Post Creek Power Project (Project No. 5655-000); and Dry Creek Power Project (Project No. 5656-000). *See* 46 Fed. Reg. 61706-08 (December 18, 1981); *id.* 62497-98 (December 24, 1981). The Tribes have intervened in the above-referenced preliminary permit proceedings and they oppose issuance of any permits.

as giving the Mission Bands an unreviewable power to prevent any unwanted use of their reservation lands. The majority's conclusion was based on a belief that the requirement of Section 4(e) of the Federal Power Act for a finding that grant of a license will not interfere or be inconsistent with the purpose of an affected reservation would be rendered "meaningless" if an applicable preexisting Indian right were held abrogated by any conflict with the new statute. 692 F.2d 1223, 1233; Appendix to Petition for Writ of Certiorari ("Pet. App.") at 21. Circuit Judge Anderson, in a concurring and dissenting opinion on rehearing, pointed out, as the Reservation Tribes have done in the FERC proceedings referred to above, that Section 16 of IRA, 25 U.S.C. § 476, contains a general provision empowering organized tribes to prevent sale, disposition, lease, or encumbrance of tribal lands without their consent. Presumably the Ninth Circuit panel might also hold that FERC's licensing power with respect to Indian reservations cannot be held to override Section 16 of IRA, applicable to organized tribes, without rendering meaningless the requirement of Section 4(e) for a finding of non-interference and non-inconsistency. Such a holding might result in FERC's being powerless to do other than the will of the Reservation Tribes in the proceedings of vital interest to the Joint Board referred to above.

ARGUMENT

Introduction

The Joint Board submits that, for reasons ably stated by Circuit Judge Anderson in his referenced separate opinion on rehearing, 701 F.2d at 829; Pet. App. at 37, the majority of the panel was clearly mistaken in its interpretation of Section 8 of MIRA as the exclusive means by which the necessary rights-of-way and easements over the reservation lands could be acquired. However, if the panel did not err in so holding (so that the Commission's power under Section 4(e) to license Indian reservation lands must indeed be read as inconsistent with and repugnant to Section 8), the panel plainly erred in concluding that the Section 8 "veto power" must be preserved in order not to render meaningless the requirement of Section 4(e) for a finding that a proposed license will not interfere with or be inconsistent with the purpose of an affected Indian reservation.

Equating a veto power with the purpose for which a reservation was established substitutes a particular procedural remedy for the substantive reasons for the establishment of Indian reservations and is plainly contrary to well reasoned authority.[5] In fact, if it is assumed

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[5] *See, e.g., Northern States Power Company*, 50 F.P.C. 753 (1973). The Joint Board believes that the divided panel's rather off-hand treatment of this point was premised on Circuit Judge Wright's extraneous dictum in *Lac Courte Oreilles Band* v. *Federal Power Comm'n*, 166 U.S. App. D.C. 245, 257-59, 510 F.2d 198, 210-12 (1975). That dictum was unnecessary to the disposition of the case before the Court of Appeals for the District of Columbia Circuit, and was in turn based on Commissioner Moody's dissenting opinion in the same case. *Id.* at 259, 510 F.2d at 212 (MacKinnon, J., concurring and dissenting). As Judge MacKinnon noted in his concurring and dissenting opinion in *Lac Courte*, this interpretation of Section 4(e) is contrary to the legislative history of the Federal Power Act and "would prevent the use of any lands in a 'reservation' (including tribal lands) in a power project." *Id.* This analysis also ignores that the real substantive purpose of all reservations, *i.e.*, to provide the Indians with a permanent home, *see Winters* v.

arguendo that the panel was correct as to the all inclusive intent of Section 8, then the licensing power contained in Section 4(e) of the Federal Power Act is plainly inconsistent with Section 8, and pursuant to Section 29 of the Federal Power Act, 16 U.S.C. § 823, Section 8 was, to the extent necessary, repealed.[6] The legislative history of Section 4(d) of the Federal Water Power Act (reenacted in 1935 as Section 4(e) of the Federal Power Act), leaves no doubt that Congress did intend by Section 4(e) to empower the Federal Power Commission (and its successor, FERC) to license Indian reservation lands without need of Indian consent.[7] The requirement in Section 4(e) for a non-interference and non-inconsistency finding, as well as the provisions for an Indian rental contained in Section 10(e) of the same Act, show conclusively that Congress believed it was enacting a comprehensive method for the granting of easements and rights-of-way over Indian lands necessary for power developments, with provision of adequate safeguards and compensation for affected tribes.

United States, 207 U.S. 564, 576 (1908), cannot be interfered with or destroyed by any project in any case, because of the necessity for non-interference and non-inconsistency findings specifically required by Section 4(e).

[6] As the panel opinion recognizes, Congress plainly retained ample power to substitute a different method for authorizing use of Indian reservation lands held in trust by the United States. 692 F.2d at 1232; Pet. App. at 18.

[7] During the debate on the Federal Water Power Act, the Senate passed an amendment to Section 4(d) (which later became Section 4(e) of the Federal Power Act) unequivocally requiring tribal consent as a prerequisite to issuance of a license involving easements or rights-of-way over tribal lands. 59 Cong. Rec. 1534 (January 14, 1920). It was clearly understood that, absent this amendment, tribal consent would *not* be required, *id.* 1566 (January 15, 1920). But the amendment was rejected in conference and stricken from the bill, the conferees observing that they "saw no reason why water-power use should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." H.R. Rep. No. 910, 66th Cong., 2d Sess. 8 (1920).

If this Court concludes, as would seem required, that FERC's comprehensive authority under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), obviates any necessity for obtaining tribal consent under MIRA, then the Court may find it necessary to address whether Section 16 of IRA, 25 U.S.C. § 476, imposes a separate requirement of Indian consent. As Circuit Judge Anderson noted in his separate opinion, this issue arises because the San Pasqual Band of Mission Indians is an organized tribe, having adopted a constitution pursuant to Section 16 of IRA. 701 F.2d at 829; Pet. App. at 38. For the following reasons, the Joint Board submits that Judge Anderson was clearly correct in concluding that Section 16 of IRA does not impose a separate requirement of Indian consent.

SECTION 3 OF IRA EXPRESSLY PRECLUDES INDIAN TRIBES FROM RESTRICTING GOVERNMENT GRANTS OR USES OF EASEMENTS OR RIGHTS-OF-WAY ON TRIBAL LANDS

Congress specifically curtailed the scope of powers given to Indian tribes by Sections 16 and 17 of IRA, 25 U.S.C. §§ 476 & 477, by expressly excluding therefrom any power to restrict the Government from the granting or use of permits for easements or rights-of-way. In Section 3 of IRA, Congress provided in pertinent part that

> Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes.

The quoted language, now codified at 25 U.S.C. § 463(b)(4), was part of a separate, free-standing second paragraph of Section 3 of IRA as enacted. The first section of IRA, 25 U.S.C. § 461, put an end to all allotment in severalty pursuant to the General Allotment Act, or Dawes Act, Act of February 8, 1887, 24 Stat. 388. Section 2 of IRA extended trust status, and restrictions on alienation of Indian lands, indefinitely. The first para-

graph of Section 3 of IRA "restored" to the Indian tribes all their unallotted lands formerly authorized to be sold or otherwise disposed of by the Dawes Act or other legislation, but not sold or disposed of.[8]

Although nothing has been found in the legislative history of IRA to confirm the precise scope and import of the above-quoted language from the second paragraph of Section 3, codified as 25 U.S.C. § 463(b)(4), the United States Court of Appeals for the Tenth Circuit apparently agrees with the Joint Board that its purpose and effect must have been to restrict powers vested in organized tribes by Section 16 by excluding therefrom the power to prevent the grant of easements for important purposes. *Plains Electric Generation & Transmission Coop. v. Pueblo of Laguna*, 542 F.2d 1375, 1380 and n.4 (10th Cir. 1976) ("rights of way were perhaps not governed" by 25 U.S.C. § 476 in light of language of 25 U.S.C. § 463(b)(4)). The purpose of 25 U.S.C. § 463(b)(4) certainly was not to save rights and claims attaching to tribal lands before restoration thereof pursuant to the first paragraph of Section 3, because the first proviso of that paragraph expressly accomplishes that saving function with respect to "restored" lands. There is also no indication that what is now 25 U.S.C. § 463(b)(4) was enacted to affect only the Papago Reservation lands dealt with in the referenced provisos to the first paragraph. Thus, the operative effect of 25 U.S.C. § 463(b)(4) is to insulate Government grants of easements or rights-of-way, including such grants in conjunction with the issuance of FERC hydropower licenses, from the exercise of any tribal "veto power" derived from Section 16.

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[8] "[A]part from . . . lengthy provisos relating to the Papago Reservation," F. Cohen, *Handbook of Federal Indian Law* 84 (1942 ed.), the first paragraph of Section 3 authorized the Secretary of the Interior to "restore[] to tribal ownership as yet unsold portions of so-called 'surplus' and 'ceded tribal' lands." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934); Conference Report, H.R. Rep. No. 2049, 73d Cong., 2d Sess. (1934), *reprinted in* 78 Cong. Rec. 12161, 12163 (June 16, 1934).

IN ANY EVENT SECTION 16 OF IRA NEED NOT BE READ AS REQUIRING TRIBAL CONSENT IN THIS CASE, BUT SUCH REQUIREMENT WOULD BE PLAINLY INCONSISTENT WITH THE EXPRESS PROVISIONS AND PURPOSES OF THE FEDERAL POWER ACT

Section 16 of IRA, 25 U.S.C. § 476, authorizes an Indian tribe to "organize for its common welfare," and to "adopt an appropriate constitution and bylaws" to become effective after tribal ratification. It provides that any constitution so adopted and ratified "shall also vest in such tribe or its tribal council" the power to retain legal counsel, to negotiate with Federal, State and local governments, and

> to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . .

As stated in the Senate Report, the purpose of what ultimately became Section 16 of IRA was "[t]o stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations." S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934); *see id.* 2 (Section 16 "gives to such organized tribes various limited powers"). This Court has cautioned against an expansive reading of tribal authority under the quoted clause, stating that the ostensibly broad statutory language should be given operative effect "only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 107 (1949).

As Judge Anderson succinctly stated in his separate opinion below, the legislative history of Section 16 of IRA "does not reveal Congress' intent . . . to supplant the federal government's power to dispose of or reclassify the use of its own property." 701 F.2d at 830; Pet. App. at 38. The reservation lands in question here are the

Government's property in the sense intended, in that title thereto is held by the United States. Certainly, the Mission Bands have not been given absolute control of these lands. Accordingly, it seems clear that Section 16 of IRA should not be read as conflicting with the clear congressional delegation of licensing power contained in Sections 4(e) and 15(a) of the Federal Power Act.

The proposition that Section 16 of IRA overrides the Commission's authority under the previously-enacted provisions of the Federal Water Power Act (and the corresponding portions of the subsequently reenacted Federal Power Act) fails to take account of the fact that IRA as a whole contemplated that the powers bestowed on Indian tribes would be only those which were not inconsistent with existing statutory law. Section 17 of IRA, 25 U.S.C. § 477, which permits incorporation by organized tribes, restricts the powers of the tribal corporations to such as are "not inconsistent with law." There is some doubt as to whether the corporate form of tribal organization made available by Section 17 was intended by Congress to be an alternative to, or in addition to, unincorporated organization pursuant to Section 16, *see Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). There is not, however, any reason whatever to believe that Congress intended that an unincorporated organized tribe should be possessed of greater powers than one choosing to operate exclusively through a corporate form of organization. Hence, it would seem that Congress contemplated that the powers of all organized tribes, whether or not incorporated, would be restricted to such as would not conflict with existing law. Such an interpretation is supported by Professor Felix Cohen in his authoritative work on federal Indian law:

> Tribal constitutions adopted pursuant to section 16 of the act . . . determine, primarily, the manner in which the tribe shall exercise powers *based upon existing law* . . . . F. Cohen, *Handbook of Federal Indian Law* 330 (1958 ed.) (emphasis added).

In any case, it is significant that the San Pasqual Band's constitution, adopted and approved pursuant to Section 16 of IRA, reflects just such an understanding of Section 16. FERC's Opinion 36 herein (Pet. App. 42, 159), quotes from Article VIII of the San Pasqual Band's constitution as follows (emphasis supplied):

> Section 1. The general council shall have the powers and responsibilities hereafter provided, *subject to any limitation imposed by the statutes or the Constitution of the United States.*
>
> * * * *
>
> (c) To veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other assets of the band made by any authority other than the general council.

It would seem clear beyond controversy, therefore, that the licensing power of FERC and its predecessor pursuant to pertinent sections of the 1920 Federal Water Power Act (reenacted as part of the Federal Power Act) constitutes one of the limitations on tribal "veto power" imposed by statutes of the United States.

Moreover, the obvious generality, *i.e.*, lack of precise focus, specificity and clarity of Section 16 of IRA, must be contrasted with the focused and precise scope of the Federal Power Act's delegation of licensing authority with respect to "reservations," which is defined to include "tribal lands embraced within Indian reservations" as only one category of "lands and interests in lands owned by the United States," *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 112, 114 (1960). Because Indian lands owned by the United States as trustee (as in the case of the Mission Indian reservations) are lands in which the United States has an interest, they clearly are encompassed within the plenary delegation of congressional Property Clause power, U.S. Const., Art. IV, § 3, cl. 2, embodied in Section 4(d) of the Federal Water Power Act (subsequently Section 4(e) of the Federal Power Act), subject to the payment to the

United States pursuant to Section 10(e) of annual charges "recompensing it [*i.e.*, the United States] for the use, occupancy, and enjoyment of its lands or other property." *See Federal Power Comm'n v. Tuscarora Indian Nation, supra* at 114.

A holding that the licensing of "tribal lands embraced within Indian reservations" is dependent upon tribal consent would in effect judicially excise one discrete category of federal "reservations" from the licensing power which Congress has delegated to the Commission. This incongruous reading of the statute would create two disparate schemes of licensing in which hydropower projects on Indian reservations could be licensed only with tribal concurrence, while the licensing of projects on all other federal "reservations" would remain within the prerogative of the Commission, as Congress intended. This interpretation would fundamentally disrupt the framework which Congress carefully constructed in Sections 3(2), 4(e) and 10(e) of the Act with respect to the licensing, use and compensation for use of lands or interest in lands in which the United States has an interest, and would represent a marked departure from this Court's analysis of the statutory interplay in *Tuscarora Nation, supra.*

If the Court does not agree that the entire matter of easements and rights-of-way was taken out of Section 16 by Section 3 of IRA, as argued *supra*, the provisions of the Federal Power Act and the language of Section 16 of IRA can be harmonized only if the authority vested in Indian tribes by Section 16 is subordinated to FERC's exercise of congressionally delegated licensing authority. Because the payment of annual charges is provided for by Section 10(e) of the Federal Power Act, this accommodation of the two statutes would not involve a taking without just compensation under the fifth amendment. *See Lac Courte Oreilles Band v. Federal Power Comm'n*, 166 U.S. App. D.C. 245, 510 F.2d 198, 208 n.38 (1975).

Finally, Section 16 of IRA, enacted in 1934, cannot be held to override Section 4(d) of the Federal Water Power

Act because Congress expressly took account of the new status of Indian tribes in the reenactment of Section 4(d) in 1935 by providing in Section 10(e) of the Federal Power Act that, in the case of licenses involving the use of tribal lands embraced within Indian reservations, FERC must fix a reasonable annual charge for the use of tribal lands "subject to the approval of the Indian tribe having jurisdiction of such lands as provided in" Section 16. Congress was mindful of the recently enacted IRA when it enacted the Federal Power Act in 1935. Had it believed that Section 16 had already given organized tribes a veto with respect to the licensing of hydroelectric projects, it would have been useless and needless to give such tribes a role in the procedures for establishing an annual charge payable upon the taking of easements and rights-of-way for such projects. Clearly, as reasoned by Circuit Judge Anderson in his separate opinion on rehearing, Congress' action in 1935 in enacting the Federal Power Act shows beyond question that Congress intended that the Federal Power Commission (now FERC) should have sole and exclusive licensing authority, without need of tribal consent.

A REQUIREMENT OF TRIBAL CONSENT WOULD CONTRAVENE SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION BY EFFECTUATING AN IMPLIED REPEAL OF FERC'S LICENSING AUTHORITY

It is a fundamental rule of statutory construction that an implied repeal of an earlier statute by a later enactment is disfavored. 1A *Sutherland Statutory Construction* § 23.10 (C. Sands ed. 1972). This principle "carries special weight" when the Court is "urged to find that a specific statute has been repealed by a more general one." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). It is apparent that any holding that the very general powers granted by Section 16 of IRA displace FERC's specific power pursuant to Section 4(d) of the 1920 Federal Water Power Act (subsequently re-

enacted as Section 4(e) of the Federal Power Act) to issue licenses for hydroelectric projects "upon any part of the . . . reservations of the United States," 16 U.S.C. § 797(e), including "Indian reservations," 16 U.S.C. § 796(2), would run afoul of this cardinal principle.

Enacted in 1934, Section 16 of IRA was intended to "provide[] a congressional sanction of self-government," F. Cohen, *Handbook of Federal Indian Law* 149 (1982 ed.). Although Section 16 embodies the congressional judgment that it was appropriate "to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority," 78 Cong. Rec. 11123 (June 12, 1934); S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934), Congress did not evince any intention to override the statutory scheme that it had enacted in 1920 for licensing, for hydroelectric power purposes, all "lands and interests in lands owned by the United States," including "tribal lands embraced within Indian reservations." 16 U.S.C. § 796(2). Indeed, in view of the comprehensive scheme of hydropower licensing incorporated in the Federal Water Power Act, it is more logical to attribute to Congress the expectation that the exercise of the tribal governmental power bestowed by Section 16 of IRA would be constrained by, and measured against the backdrop of, these preexisting statutory requirements. Again, as succinctly stated by Professor Cohen:

> Tribal constitutions adopted pursuant to section 16 of the act . . . determine, primarily, the manner in which the tribe shall exercise powers *based upon existing law* . . . . F. Cohen, *Handbook of Federal Indian Law* 330 (1958 ed.) (emphasis added).

Thus, the facially expansive power of an Indian tribe under Section 16 "to prevent the sale, disposition, lease, or encumbrance of tribal lands" is appropriately and necessarily qualified and constrained to the full extent that Congress has entrusted the Commission to license federal "reservations" for hydropower purposes by vir-

tue of the provisions of the Federal Water Power Act which preceded the enactment of IRA. Judge Anderson, in his concurring and dissenting opinion below, applied the proper framework of analysis when he concluded that the Federal Power Act provides a "direct and specially-tailored scheme for appropriation of Indian lands" and that Sections 3(2), 4(e) and 10(e) of that Act furnished "express congressional authority for acquiring such property" notwithstanding the absence of Indian consent. 701 F.2d at 829, 830; Pet. App. at 36, 39. Because the two statutes are reconcilable in this manner, there is no "permissible justification for a repeal by implication." *Morton v. Mancari, supra* at 550.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded to FERC for further proceedings.

Respectfully submitted,

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